

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
September 18, 2009 Session

**LOU MEE v. ROBERT ESTEP and wife, ANN ESTEP**

**Appeal from the Circuit Court for Jackson County**  
**No. 1807-P-45     John D. Wootten, Jr., Judge**

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**No. M2009-00836-COA-R3-CV - Filed November 3, 2009**

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The defendants challenged the trial court's refusal to grant a declaratory judgment on their defenses cast as counterclaims under the Declaratory Judgment Act, Tenn. Code Ann. § 29-14-101 *et seq.*, after the plaintiff non-suited at the close of plaintiff's proof. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court**  
**Affirmed.**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

David Day, Benjamin D. Marsee, Cookeville, Tennessee, for the appellants, Robert Estep, and wife, Anne Estep.

Michael Savage, Livingston, Tennessee, for the appellee, Lou Mee.

**MEMORANDUM OPINION<sup>1</sup>**

The basic facts of this case are not in dispute despite their rather unusual and confusing nature. In September of 2000, Ms. Mee sold convenience store property to Robert and Anne Estep. To finance the sale, the Esteps gave Ms. Mee two promissory notes, one for \$35,000 and the other for \$100,000. These notes were in turn secured by two (2) deeds of trust on the purchased property. Apparently the Esteps ran the convenience store on the property and for several years made payments on the notes.

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<sup>1</sup>Tenn. R. Ct. App. 10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Thereafter, a third party bought the property from the Esteps. The proceeds from this sale, however, were not used to retire the debt owed Ms. Mee or release the deeds of trust on the property. After the sale, the Esteps continued to make payments to Ms. Mee, and the property remained encumbered by both deeds of trust.

In 2005, the Esteps began to falter in their payments to Ms. Mee. On or about this time the store was significantly damaged by fire. Due to the Esteps' default in making payments, Ms. Mee began the process to foreclose on the property. The published notice of the foreclosure sale, however, apparently referenced only the deed of trust securing the \$100,000 note. The deed of trust securing the \$35,000 note was not mentioned in the notice. On June 15, 2007, a foreclosure sale was held with Ms. Mee purchasing the property as sole bidder for \$10,000.

Ms. Mee filed this suit against the Esteps seeking a deficiency judgment of \$109,500.20 representing the amount of the Esteps' debt after deducting the \$10,000 proceeds of the foreclosure sale. On the day of trial, the Esteps were granted leave to amend their answer as follows:

As affirmative defenses and/or as counter-claims, the Esteps would allege the following:

...

2. As an affirmative defense and counter-claim, the Esteps allege that the foreclosure sale of the property was not conducted in a commercially reasonable manner, and/or involved irregularity, misconduct, fraud or unfairness, and that the Esteps have damages as a result thereof such that they should not have any liability or obligation to Ms. Mee and/or their obligations should be reduced.

...

4. As an affirmative defense and counter-claim the Esteps plead set-off and/or recoupment.

5. As a counter-claim, the Esteps seek a declaratory judgment that they do not owe any amount or alternatively, the amount they do owe.

The transcript of the proceedings shows that at the close of Ms. Mee's proof there were problems with her proof as to the amount of the outstanding indebtedness and the value of the foreclosed property. When the trial court refused Ms. Mee's request to reopen the proof, Ms. Mee was allowed to take a voluntary non-suit without objection.<sup>2</sup>

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<sup>2</sup>No one raised the issue at trial or on appeal the question of whether plaintiff could take a voluntary non-suit of her claims if defendants had compulsory counterclaims under Tenn. R. Civ. P. 13.01.

At that point, relying on the proof submitted to the court, the record shows that the Esteps asked the trial court to rule on their counterclaims that the foreclosure was defective due to the unreasonable price, that the \$35,000 debt could be set off since it was not mentioned in the foreclosure notice, and that the \$35,000 note was extinguished under the merger doctrine. The trial court, however, found that there were no counterclaims, and the Esteps' request for declaratory relief was consequently denied.

The Esteps appealed and argue that the trial court erred in failing to grant them a declaratory judgment on their three counterclaims and in failing to declare that the Esteps had no further obligation to Ms. Mee.

## I. ANALYSIS

On appeal, the Esteps argue in large part the substantive merits of their claims. The trial court, however, made no finding on the substantive merits of their claims. The trial court, instead, found that the Esteps did not assert any counterclaims, *i.e.* the Esteps asserted only defenses to Ms. Mee's claims. Absent a counterclaim, voluntary non-suit by the plaintiff resulted in dismissal of case.

The Esteps argue that their affirmative defenses to Ms. Mee's claim for a deficiency judgment became counterclaims when posited as requests for declaratory judgment. According to their argument, the trial court erred by failing to grant them a declaratory judgment on their counterclaims. We disagree.

The trial court acted within its discretionary authority to refuse to grant any relief. It is clear that under the Declaratory Judgment Act the decision whether to grant relief is discretionary. *Earhart v. City of Bristol*, 970 S.W.2d 948, 953 (Tenn. 1998); *City of Chattanooga v. Cinema 1, Inc.*, 150 S.W.3d 390, 403 (Tenn. Ct. App. 2004); *Huntsville Util. Dist. v. General Trust Co.*, 839 S.W.2d 397, 400 (Tenn. Ct. App. 1992). As described by the Supreme Court in *Earhart*, "[t]he trial court's discretion in refusing a declaration is 'very wide,' and will not be disturbed on appeal unless the trial judge has acted arbitrarily. 970 S.W.2d at 953 (citing *Standard Accident Ins. Co. v. Calvin*, 400 S.W.2d 235, 236 (1966); *Southern Fire & Cas. Co. v. Cooper*, 292 S.W.2d 177, 178 (Tenn. 1956)).

Just because the Esteps characterize their defenses to Ms. Mee's request for a monetary judgment as counterclaims for declaratory relief does not make them so. We share the trial court's opinion that they are simply defenses to Ms. Mee's claims. As such, they were dismissed when the voluntary nonsuit was granted. The Esteps did not object to the nonsuit.

Even assuming that the Esteps' defenses could be considered counterclaims, they do not state a claim under the Declaratory Judgment Act. Tennessee Code Annotated § 29-14-103 provides for a declaration of rights, status, or other legal relations under a contract (or other writing) or under a

statute or ordinance. The language of paragraphs 2, 4, and 5 of the Esteps' amended answer does not ask for a declaration that fits within the statute.

Finally, even if the Esteps were allowed to proceed with their defenses as counterclaims, judgment for them could not be granted without giving Ms. Mee, as counterdefendant, the opportunity to put on additional proof in defense.

For all these reasons, we find that the trial court acted within its discretion and, consequently, we affirm the trial court. Costs of this appeal are taxed against Robert and Ann Estep, for which execution may issue if necessary.

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PATRICIA J. COTTRELL, P.J., M.S.